NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MELANIE CAHN, Plaintiff and Respondent, v. LUCILLE MOLINARI, as Executor, etc., Defendant and Appellant.	A140329 (City & County of San Francisco Super. Ct. No. CGC-11-507801)

This case is a declaratory relief action filed to determine respondent Melanie Cahn's entitlement to two Roth IRAs belonging to decedent, Joseph Lococo (Joseph). The court ruled in favor of Melanie Cahn, Joseph's fiancée, and against defendant Lucille Molinari (Molinari), executor of the estate of Joseph's father, Albert Lococo (Albert).[1] The court determined that Joseph, shortly before his death, effectively named Cahn beneficiary of his IRAs. We affirm.

BACKGROUND

There are no reporter's transcripts of the trial court proceedings, so we take the facts from the statement of decision.

Cahn and Joseph began dating nearly a decade before he died, lived together in three homes, were engaged, but never married. In 2009, Joseph was diagnosed with Amyotrophic Lateral Sclerosis, commonly referred to as Lou Gehrig's disease. Shortly after the diagnosis, Joseph moved into his father's apartment to help care for Albert, who

[1] For consistency, we refer to individuals in the case by the names used in the trial court's statement of decision.

was himself in failing health and suffering from dementia. Cahn visited or spoke with Joseph every day. By March 2010, Joseph's disease had progressed to the point where he could no longer feed himself or write.

On March 17, 2010, at Joseph's request, he met with Cahn and her mother and stepfather at Cahn's apartment. Joseph asked Cahn's mother to transcribe his will. Joseph dictated a will that gave Albert his Bank of America stock, and his CD and checking accounts at Redwood Credit Union. He provided that Cahn would receive his Wells Fargo savings and checking accounts, and "[m]y Roth IRA at American Funds." Joseph signed the document, and it was witnessed by Cahn's mother and stepfather. Cahn's mother gave the original of the will to Joseph, and copies to Joseph and Cahn. The original will was not found, and a copy was admitted into evidence.

Shortly after Joseph's 60th birthday on April 10, 2010, he asked his cousin, Gino Molinari (Gino), to meet with him about estate planning.[2] Gino was counsel for the estate in Albert's probate, and a named beneficiary of Albert's estate. Gino testified that he went to Joseph's apartment, and asked Cahn to leave the room so he could speak privately with Joseph. According to Gino, Joseph told him that he was concerned about leaving Albert enough money to pay for his care. Joseph said he had two IRA accounts, one worth about $80,000 and the other about $30,000. He wanted to leave the larger account to Albert and the smaller one to Cahn. Joseph asked how he could change beneficiaries on the accounts, and Gino advised that he would need to do so on American Funds' form. Gino told Joseph to call him if he wanted the form and he would take care of it. Gino said that when the meeting ended, Joseph had not made up his mind about changing beneficiaries.

Cahn testified that Joseph was very upset after Gino left. He said he did not want his family in his business, and asked her to secure the services of an attorney to review his estate. At Joseph's direction, Cahn made some changes to his will on April 24, 2010, but the provision giving the IRA to Cahn was unchanged. Cahn had made an

[2] Gino is Molinari's counsel on appeal.

appointment for Joseph to meet with an estate attorney on April 28, 2010, but when she and the attorney went to Joseph's apartment for the meeting they learned that he had died that day.

In February 2011, Cahn filed a complaint for declaratory relief, seeking a judicial determination that as of March 17, 2010, the day Joseph executed his will, she was the sole beneficiary of his two American Funds Roth IRAs. The original complaint named Albert, the original beneficiary of the IRAs, as the defendant, but Albert died before he could be served with the complaint.

Albert's will was admitted to probate, and Molinari rejected Cahn's creditor's claim against his estate. Cahn then filed a first amended complaint against Molinari, in her capacity as executor. Molinari's motion for judgment on the pleadings was granted, with leave for Cahn to amend to clarify that her action was based on a change to the beneficiary of Joseph's IRAs, not his will.

Cahn filed her second amended complaint seeking a judicial declaration that Joseph's March 17, 2010 written instrument made Cahn the primary beneficiary of Joseph's IRAs, and that Cahn became the sole lawful owner of those funds when Joseph died. Molinari moved for a second judgment on the pleadings and the motion was denied. The case proceeded to a four-day court trial.

The court found that Joseph "clearly intended to bequeath the IRAs to Cahn." The court observed: "Cahn and Joseph conducted their lives as though they were married people . . . . [¶] . . . Joseph had no children and no other family, except for Albert, for whom he felt any responsibility. In furtherance of such intent, Joseph went through the trouble of dictating the March 17, 2010 document, signing it, and retaining witnesses to the document." The court continued: "[Joseph] took all reasonable steps given his rapidly deteriorating health, to effectuate his intentions." After dictating the will, his "continued efforts to retain an estate planning attorney to complete his intentions is probative that he did all that he could under the circumstances."

Although the will referred to only one IRA, the court found it "clear from the evidence that Joseph treated the word IRA as covering all of his IRA investments at

American Funds." "Joseph was very specific in naming items that were to go to each of the named beneficiaries." "He took great care to give his father 'my stock in the Bank of America' and his CD and checking account at the Redwood Credit Union. He gave certain personal items, including sports memorabilia, to Cahn and other friends, and he gave his checking and savings account at Wells Fargo to Cahn as well." "Had Joseph wanted his father Albert to get one IRA and Cahn the other, he could have made that provision." "If Joseph had IRA accounts at different financial institutions, the result may be different. But here, he clearly intended that the IRA account (whether one, two, or ten) at American Funds go to Cahn."

Section 8(a)(ii) of the American Funds' custodial agreement for Roth IRAs in effect when Joseph executed the March 17, 2010 will provided: "The Owner may designate or change a Beneficiary only by signed written notice to, and in a form acceptable to the Custodian . . . . The designation or change will take effect as of the date the written notice was executed, provided that the designation or change is delivered to the Custodian prior to the Owner's death."

The court concluded, based on case law we will discuss below and referenced in the statement of decision, that "strict compliance with the Custodial Agreement is not necessary when Joseph clearly intended to designate Cahn as beneficiary, and he took affirmative steps to effectuate that intention." The court pointed out that the agreement "only requires 'written notice' and does not require a specific form. In that vein, the March 17, 2010 written document does not need to be in any particular format so long as it manifests Joseph's intent, as it did. The court does not need to find it to be a proper will. The written affirmation can be in the form of a beneficiary designation form, will, or simple declaration." The court also noted that the agreement did not "preclude a change in beneficiary designation via a written notice sent to the custodian after death. [Section 8(a)(ii)] prevents only the change in beneficiary from taking effect on the date of execution. Yet, there is no prohibition against the change of beneficiary from taking effect upon death or date of delivery if the notice is delivered after death." The court determined that the change in this case “took effect when the notice of change was delivered to the Custodian prior to distribution of the IRAs.”

DISCUSSION

Molinari contends that the court should have granted her motion for judgment on the pleadings because Code of Civil Procedure section 1060 provides that declaratory relief is available for determining the rights of parties “under a written instrument, *excluding a will*. ” (Italics added.) However, Cahn did not file this action to determine rights under Joseph’s will. It was instead filed to determine the beneficiary of Joseph’s retirement accounts, and the will simply served as evidence of Joseph’s intent. As the trial court properly noted, it was irrelevant whether that intent was expressed in a will or some other type of document.

Molinari also contends that she was entitled to judgment on the pleadings because Cahn did not have a valid creditor’s claim against Albert’s estate, but fails to explain why the invalid claim deprived Cahn of standing to pursue this action for declaratory relief.

Molinari argues that the will did not change the beneficiary designation because only a copy of it was produced, not the original. This argument is based on Probate Code section 6124, which provides: “If the testator’s will was last in the testator’s possession, the testator was competent until death, and neither the will nor a duplicate original of the will can be found after the testator’s death, it is presumed that the testator destroyed the will with intent to revoke it. This presumption is a presumption affecting the burden of producing evidence.” (Prob. Code, § 6124.)

The trial court rejected this argument as follows: “Molinari discusses, at length, the necessity of an ‘original’ will. The Court does not need to address this issue since the beneficiary designation does not need to be on a will governed by the Probate Code. Nonetheless, the Court finds that even though the original document was not presented at trial, subsequent actions taken by Joseph evidenced both by documents admitted into evidence and credible testimony, demonstrate that he intended to name Cahn as the beneficiary of his IRAs up to his death bed. These include: (1) the oral testimony regarding the April 24, 2010 changes to Joseph’s March 17 will; (2) oral testimony and subsequent conduct by Cahn securing an independent estate attorney for Joseph; (3) Albert's advanced age and poor health and the lack of evidence that Albert needed financial support from Joseph; and (4) the inference that can be drawn that Joseph was in such poor health that he simply lost the original."

As the trial court correctly observed, Probate Code section 6124 is inapplicable because this case is not a will contest. (See generally Ross, et al., Cal. Practice Guide: Probate (The Rutter Group 2014) ¶ 15:164 – 15:165, p. 15-50.9 (rev. #1, 2014) [explaining the statute's operation in probate cases].) Even if a presumption of revocation applied, it was adequately rebutted by the evidence before the trial court. (See, e.g., *Estate of Trikha* (2013) 219 Cal.App.4th 791, 804–806.)

Turning to the merits, and as discussed in the statement of decision, different requirements for changing beneficiaries apply to cases involving retirement benefits and those involving life insurance policies. A change in connection with a life insurance policy must generally " 'be made in accordance with the terms of the policy. If it is not, no change is accomplished, unless whatever occurred in that respect comes within one or more of the three exceptions to the rule. The three exceptions are (1) when the insurer waives strict compliance with its own rules regarding the change; (2) when it is beyond the insured's power to comply literally with the insurer's requirement; or (3) when the insured has done all that he could to effect the change but dies before the change is actually made.' " (*State Farm Life Ins. Co. v. Brockett* (E.D. Cal 2010) 737 F.Supp.2d 1146, 1157 (*Brockett*) [applying California law].)

The rules for retirement benefits are less strict. A change of beneficiaries for retirement benefits is effective "where it is established that there was an intention to change and there was some affirmative action evidencing the exercise of the right to change." (*Watenpaugh v. State Teachers' Retirement* (1959) 51 Cal.2d 675, 681 (*Watenpaugh*); see *id*. at pp. 681–682 [distinguishing life insurance contracts]; *Lyles v. Teachers Retirement Bd.* (1964) 219 Cal.App.2d 523, 528-529 (*Lyles*) [applying *Watenpaugh*]; but see *BankAmerica Pension Plan v. McMath* (9th Cir. 2000) 206 F.3d

821, 830 (*McMath*) [declining to extend *Watenpaugh* to a beneficiary designation under a 401(k) pension plan].)

The trial court concluded that the relatively strict standards for changing beneficiaries under life insurance contracts should not be applied here because "insurance plans are set up for the benefit of third parties in the event of the insured's death. Generally, insurance plans are not intended for use or benefit of the insured during her lifetime. . . . 'The designation of a beneficiary in a policy of life insurance initiates in favor of the beneficiary an inchoate gift of the proceeds of the policy, which, if not revoked by the insured prior to his death, vests in the beneficiary at the time of his death.' [Citation.] Therefore, it makes sense to require strict compliance in life insurance plan cases." The court concluded that the requirements applied in *Watenpaugh* and *Lyles* for changing beneficiaries of public retirement plans should govern because Roth IRA contributors could withdraw their contributions at any time, and, like the employees in *Watenpaugh* and *Lyles*, did not need to designate any beneficiary (see *Lyles*, *supra*, 219 Cal.App.2d at p. 526 ["without a beneficiary, the funds would be payable to her estate"]).

Molinari makes no attempt to grapple with the trial court's persuasive reasoning. Her critique of *Watenpaugh* and *Lyles* merely notes that the controlling documents in those cases were originals, not copies—an irrelevant fact—and that the *McMath* court declined to apply *Watenpaugh* in the context of a 401(k) plan—a questionable decision.

The court determined that Joseph's actions satisfied the *Watenpaugh* requirements because he evidenced "an intention to change" beneficiaries and took an "affirmative action evidencing the exercise of the right to change." (*Watenpaugh, supra,* 51 Cal.2d at p. 681.) The court further concluded that, even if the stricter standards for life insurance policies applied, they were also satisfied.

As we have said, the third exception to the strict compliance rule for life insurance policies is fulfilled " 'when the insured has done all that he could to effect the change but dies before the change is actually made.' " (*Brockett, supra,* 737 F.Supp.2d at p. 1157.) Under this substantial compliance exception, "where the insured makes every reasonable effort under the circumstances, complying as far as he is able with the rules, and there is a clear manifestation of intent to make the change, which the insured has put into execution as best he can, equity should regard the change as effected." (*Pimentel v. Conselho Supremo de Uniao Portugueza do Estado da California* (1936) 6 Cal.2d 182, 187–188.)

As the trial court observed, substantial compliance turns on the facts of each case. One of the facts the court found relevant here was that Gino gave Joseph incorrect advice about what he needed to do to effectuate his change of beneficiaries. Gino told Joseph he had to submit a new beneficiary designation on the custodian's form, but that was not necessarily true because the custodial agreement only required "written notice . . . in a form acceptable to the Custodian." Thus, a copy of the will or a letter could have sufficed, and Joseph was likely deterred from sending the change to the custodian due to Gino's advice.

For example, in *Saunders v. Stevers* (1963) 221 Cal.App.2d 539, the insured sent the insurer a letter stating that she wanted to make her daughter sole beneficiary of her life insurance policies. The insurer sent the insured its forms for changing beneficiaries, but the insured never returned them. The insurance policies provided that beneficiaries could be changed "by written notice in form acceptable to the Company, which will be furnished on request." (*Id.* at p. 541.) The court wrote: "The provisions in [the] insurance policies relating to change of beneficiary are obviously ambiguous, but they appear to confer upon the policyholder the broad right to change beneficiary by notice in writing given to the company. The requirement of written notice was fully observed by [the insured] in her letter . . . ." (*Ibid.*) Since the insurer had no objection "to pay[ing] the beneficiary who by law is entitled to the proceeds of the policies," the "notice of change complied with the policy requirements and [was] sufficient to accomplish the purposes intended . . . ." (*Id.* at p. 542.)

The court found substantial compliance here, explaining that "Joseph clearly intended to designate Cahn to receive the proceeds of the subject IRAs and that he took all reasonable steps given his rapidly deteriorating health, to effectuate his intentions. Specifically, this included his dictating the March 17, 2010 document, executing it, and retaining witnesses. Subsequent representations by Gino misled Joseph into not sending the document (or for that matter any document other than the purported forms required by the Custodian) to the Custodian prior to his death. Nonetheless, Joseph's continued efforts to retain an estate planning attorney to complete his intentions is probative that he did all that he could under the circumstances." The court's determination was reasonable and supported by substantial evidence.

Molinari contends, with little analysis, that the result here should be the same as the one reached in *McMath*, but that case is distinguishable. The *McMath* court held that Clarence Montgomery, a 401(k) account holder, did not substantially comply with the plan's beneficiary designation requirements when he submitted an unsigned form purporting to change the designation. (*McMath*, *supra*, 206 F.3d at p. 831.) Although Montgomery submitted the form in the year he died, there is no suggestion in the opinion that he was ill when he prepared the form, or had any other excuse for neglecting to sign it. The court said, "At best, Mr. Montgomery was careless when he failed to sign the beneficiary designation form. He did not do all that he could have done." (*Ibid*.) Unlike Montgomery, Joseph did nothing careless, and the evidence supports the trial court's finding that he did everything he could to change beneficiaries given his failing health.

DISPOSITION

The judgment is affirmed.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Jenkins, J.